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IN THE

Supreme Court of the United States

October Term, 1960.

No. 2[illegible]

PENNSYLVANIA TURNPIKE COMMISSION,
Petitioner,

v.

EDGAR A. McGINNES, District Director of Internal Revenue, Philadelphia,
Respondent,

and

MANU-MINE RESEARCH & DEVELOPMENT COMPANY,
Respondent,

and

SEABOARD SURETY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No.

PENNSYLVANIA TURNPIKE COMMISSION,
Petitioner,

v.

EDGAR A. McGINNES, DISTRICT DIRECTOR OF INTERNAL REVENUE, PHILADELPHIA,
Respondent,

AND

MANU-MINE RESEARCH & DEVELOPMENT COMPANY,
Respondent,

AND

SEABOARD SURETY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW.

The Opinion of the Court of Appeals in the present case has not yet been reported, and is printed in the Appendix hereto. The Opinion of the District Court is reported at 179 F. Supp. 578 (E. D. Pa. 1960). It is also contained in pages 16a-24a of the appendix record as printed for the use of the Court of Appeals, of which nine (9) copies are filed herewith, under the provisions of Rule 21.

The opinions of the District Court and Court of Appeals in the related case of *Pennsylvania Turnpike Commission v. McGinnes* are reported at 169 F. Supp. 580 and 268 F. 2d 65, respectively. This Court denied the petition for a writ of certiorari in that case at 361 U. S. 829.

JURISDICTION.

The judgment of the Court of Appeals is dated and was entered on May 24, 1960. Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

Does a United States District Court have jurisdiction of an action removed from a state court under 28 U. S. C. § 1442 by respondent, District Director of Internal Revenue, wherein petitioner, Pennsylvania Turnpike Commission, an agency of the Commonwealth of Pennsylvania, seeks to enjoin the District Director from refunding to respondent, Manu-Mine Research and Development Company, or its assignee, respondent, Seaboard Surety Company, over $900,000 fraudulently obtained from petitioner by Manu-Mine, and used by Manu-Mine to pay its 1955 income tax, where Manu-Mine has applied for a refund of the tax, and wherein petitioner also seeks an order directing payment of any such refund determined to be due, to petitioner as rightful owner of the fund?

STATUTES INVOLVED.

The case involves § 1442(a) of the Judicial Code of the United States, which provides that: "A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue . . . ." Act of June 25, 1948, c. 646, 62 Stat. 938, 28 U. S. C. Section 1442(a)(1).

STATEMENT OF THE CASE.

Petitioner, Pennsylvania Turnpike Commission, brought this suit in a Pennsylvania state court to enjoin the District Director of Internal Revenue in Philadelphia from paying to respondent, Manu-Mine Research and Development Company, or its assignee, respondent, Seaboard Surety Company, a tax refund of about $900,000 derived from funds possession of which is alleged to have been fraudulently obtained by Manu-Mine from petitioner. The complaint alleged that in 1956 Manu-Mine paid more than $1,000,000 on its 1955 federal income tax, using for that purpose money obtained by fraud from petitioner, and that the funds so paid were and are petitioner's property and did not belong and have not rightfully belonged to Manu-Mine. The tax payment was made to defendant McGinnes, District Director of Internal Revenue in Philadelphia. Thereafter Manu-Mine or its assignee, Seaboard, applied to McGinnes for a refund of such tax payment in the amount of about $900,000. McGinnes was about to allow the claim for refund and to direct its payment to

Manu-Mine or Seaboard. Petitioner notified McGinnes of its claim to the fund but despite the notification, McGinnes refused to recognize petitioner's claim and refused to withhold payment of the fund pending determination of petitioner's claim.

The prayer for relief sought an injunction restraining McGinnes from making the refund payment to Manu-Mine or Seaboard and an order, directing him to pay over the fund to petitioner, upon a determination that it belonged to petitioner.

The District Director removed the case to the United States District Court for the Eastern District of Pennsylvania, pursuant to 28 U. S. C. § 1442(a)(1), and filed an answer on the merits denying liability. Manu-Mine and Seaboard moved to dismiss for lack of jurisdiction. The District Court granted their motions, on the ground that the state court, where the action originated, had no power to enjoin a federal officer in a matter involving his official duties, even though only ministerial and not discretionary action was sought to be enjoined, and that, accordingly, the federal court could acquire no jurisdiction on removal. The Court of Appeals affirmed in a brief opinion, adopting the reasoning of the district court. Before the Court of Appeals, the District Director joined in the positions of Manu-Mine and Seaboard.

Petitioner had originally filed an action seeking the same relief in the United States District Court, but the Court of Appeals held that there was no original federal jurisdiction and accordingly that action was dismissed. *Pennsylvania Turnpike Commission v. McGinnes*, 268 F. 2d 65 (3d Cir. 1959). This Court denied certiorari. 361 U. S. 829. That decision left open the question of state court jurisdiction.

REASONS FOR ALLOWING THE WRIT.

This case involves the rights of petitioner, the victim of a fraud, to recover a tax refund applied for by the defrauding wrongdoer, who paid a federal income tax on the fraudulently obtained funds with the fraudulently obtained funds. Petitioner seeks to prevent the refund from being returned to the wrongdoer. The right to refund arises from a loss carryback available to the wrongdoer from a later year, but the only money that can be returned by way of refund is that of petitioner, since that was the only money paid by the wrongdoer to the District Director in the first instance. The case has great public importance in that the defrauded party is a governmental instrumentality of the Commonwealth of Pennsylvania. Criminal convictions of Manu-Mine's president and general manager have been affirmed by the Pennsylvania Supreme Court. *Commonwealth v. Evans*, 399 Pa. 387 (1960).

In *Commissioner of Internal Revenue v. Wilcox*, 327 U. S. 404 (1946) and *Rutkin v. United States*, 343 U. S. 130 (1952), this Court considered the taxability to the wrongdoer of money obtained by embezzlement and extortion, and recently again granted certiorari on the issue of the taxability of embezzled funds. *James v. United States*, October Term, 1959, No. 820, cert. granted May 16, 1960. In none of these cases was the claim of the victim for recovery of the funds at issue, as it is here, although the majority opinion in *Wilcox* and the dissenting opinion in *Rutkin* indicate a sensitivity to the problem.

Learning that the District Director was about to make a quick administrative refund to Manu-Mine, petitioner originally brought suit to prevent it in the United States District Court, and that suit, as noted above, was dismissed, for lack of original federal jurisdiction. This suit was then filed in the state court and removed by the District Director.

If that avenue also is to remain closed to petitioner, as it has been by the decisions of the District Court and Court of Appeals, then petitioner has no recourse to prevent the refund from returning straight into the hands of the defrauder.

Petitioner submits that the result reached by the District Court and Court of Appeals are incorrect, and cannot be squared with the decisions of this Court in *Houston v. Ormes*, 252 U. S. 469 (1920) and *Brooks v. Dewar*, 313 U. S. 354 (1941). *Houston v. Ormes* was a suit to impress an equitable lien on a fund in the hands of the Secretary of the Treasury for payment to another, against whom plaintiff had the right to the equitable lien. It was brought in the District Court of the District of Columbia, but, as this Court characterized it, it was an equitable action, and not a mandamus action. The plaintiff's right to maintain the action was sustained.

The relief sought in that case closely parallels the relief sought here, where petitioner seeks to impress an equitable lien on a tax refund, only upon a determination that such refund is to be paid, and does not seek to compel the exercise of any discretionary action. Meanwhile, an injunction is sought to prevent payment of the refund to the wrongdoer, pending the determination of petitioner's rights. As pointed out in *Houston v. Ormes*, this is not a suit against the United States, since it seeks to affect only the ministerial duty of payment, after the refund has been allowed, and to maintain the status quo meanwhile.

The Court of Appeals in the first action, distinguishing *Houston v. Ormes*, advanced there by petitioner as a basis for sustaining federal jurisdiction, had this to say: "As the Supreme Court recognized, the generally equitable jurisdiction of the District Court of the District of Columbia, analogous to the equitable jurisdiction of a state court, was invoked. Here in Pennsylvania it is the state courts and not any federal court which exercise such jurisdiction." *Pennsylvania Turnpike Commission v. McGinnes*, 268 F. 2d

65, 68 (3d Cir. 1959). Now the Court of Appeals has rejected state court jurisdiction as well.

This result has been reached on the doctrinal ground that a state court has no jurisdiction to enjoin a federal officer, even in a purely ministerial matter. In that respect, it conflicts with *Brooks v. Dewar*, 313 U. S. 354 (1941), where this Court expressly held that a state court has equitable jurisdiction to enjoin a federal officer but proceeded to deny recovery on the merits. This is distinct from the mandamus cases, where both federal and state jurisdiction have been denied. *McClung v. Silliman*, 6 Wheat. 598 (1821).

The federal government preserves ample protection against state interference in two ways. First, if essential interests of the United States are involved, both state and federal jurisdiction will be denied, on the ground that the United States has not consented to suit. Secondly, as Professor Moore has pointed out, in arguing in favor of state court jurisdiction to enjoin federal officers, the federal government is protected by the broad right of removal given to its officers. 1 *Moore's Federal Practice*, Para. 0.6(5), p. 247. Here, the United States is not an indispensable party or the real party in interest and removal has been effected by the District Director. The apprehension of state interference with federal functions, expressed by the district judge here as the underlying basis for his decision, is therefore not realistic. *Brooks v. Dewar*, which sustains jurisdiction, has never been overruled.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,169

PENNSYLVANIA TURNPIKE COMMISSION,
Appellant

v.

EDGAR A. McGINNES, DISTRICT DIRECTOR OF INTERNAL REVENUE OF PHILADELPHIA, MANU-MINE RESEARCH AND DEVELOPMENT COMPANY AND SEABOARD SURETY COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued May 13, 1960

Before GOODRICH, McLAUGHLIN and STALEY, *Circuit Judges*.

OPINION OF THE COURT

(Filed May 24, 1960)

PER CURIAM

This is an appeal from an order of the District Court for the Eastern District of Pennsylvania dismissing the complaint of the Pennsylvania Turnpike Commission against the District Director of Internal Revenue for lack of jurisdiction and remanding the case against the other de-

fendants to the state courts. It is the second time the case has been in this Court. In the first case we held that the United States District Court did not have original jurisdiction of the action. *Pennsylvania Turnpike Commission v. McGinnes*, 268 F. 2d 65 (3d Cir.), *cert. denied* 361 U. S. 829 (1959). Then the plaintiff started an action in the Common Pleas Court of Philadelphia County, and the District Director removed it to the federal district court for the Eastern District of Pennsylvania under 28 U. S. C. A. 1442 (a)(1). The complaint seeks an injunction against the District Director of Internal Revenue or his successors restraining payment of a tax refund to Manu-Mine Research & Development Company or its assignee, Seaboard Surety Company, and certain injunctive relief against the two companies. We were advised upon argument that this tax refund has not yet been allowed through the formal channels necessary in the Bureau of Internal Revenue.

The district judge dismissed the complaint against the District Director for lack of jurisdiction and remanded the case against the other defendants to the state courts. He made a complete analysis of the problem and discussed the authorities. He was mindful of the difference alleged to be presented between this suit and the former one, already referred to. He also pointed out that the plaintiff was not without remedy against the other defendants in the state courts of Pennsylvania. 179 F. Supp. 578 (E. D. Pa. 1959).

We agree with the result reached by Judge Clary and think that progress of the case will be assisted by the prompt expression of that agreement rather than postponing what we have to say until a more formal opinion can be written.

The judgment of the district court will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,169.

PENNSYLVANIA TURNPIKE COMMISSION,
Appellant,

v.

EDGAR A. McGINNES, DISTRICT DIRECTOR OF INTERNAL REVENUE OF PHILADELPHIA, MANU-MINE RESEARCH AND DEVELOPMENT COMPANY AND SEABOARD SURETY COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: GOODRICH, McLAUGHLIN and STALEY, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs to Manu-Mine Research and Development Company and Seaboard Surety Company.

Attest:

IDA O. CRESKOFF,
Clerk.

May 24, 1960